REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL APPEAL 225 OF 2006

(From original conviction and sentence in Criminal Case No. 5731 of 2005 of the Principal Magistrate's court at NYAHURURU – H. M. NYABERI, RM)

CHARLES WAMBUGU MAHINDA.....……APPELLANT

VERSUS

REPUBLIC……...……...……RESPONDENT

JUDGMENT

The appellant was charged with defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the offence were that on the 30th day of November, 2005, at X-Daya village in Nyandarua District within Central Province the appellant had unlawful carnal knowledge of Tabitha Wangari Warutumo, a girl under the age of 16 years.

After a full trial, the appellant was found guilty, convicted and sentenced to 7 years imprisonment. The appellant was aggrieved by the conviction and sentence and appealed to this court. He stated that there was no sufficient evidence to warrant his conviction. He further stated that he was convicted on uncorroborated evidence of a single witness. With regard to the sentence, he stated that the same was harsh and excessive.

This being the first appellate, court has to consider the evidence that was tendered before the trial court, re-evaluate the same and reach its own conclusion. The court must however bear in mind that it did not have the opportunity of seeing the demeanour of the witnesses who testified before the trial court. See ***Okeno Vs Republic [1972] EA 32.***

I will therefore proceed to consider the evidence that was tendered before the trial court and re-evaluate the same. The complainant was aged 15 years. She testified that on the material day at about noon, she was driving her parent's cows from a stream when the appellant called her to his employer's parcel of land which had some bushes. The appellant grabbed the complainant, touched her breasts, removed her underpants and covered her mouth with his hand. He then defiled her sexually for almost thirty minutes. Thereafter the complainant went home crying and informed her mother, Margaret Muthoni, PW2, who decided to approach the appellant and seek an explanation from him. The appellant denied having defiled the complainant. The complainant's mother made a report to the police and thereafter took the complainant to Nyahururu District Hospital. The police visited the scene and found that there was a gentle slope and the grass thereon had been disturbed.

Peter Muthee Mathenge, PW4, a Clinical Officer examined the complainant and found that her hymen had been broken. There was also spermatozoa in her private parts and in his view, there was conclusive evidence that the complainant had been sexually assaulted.

In his sworn defence, the appellant stated that on the material day he was at his employer's parcel of land cutting trees to mend a fence. He was then called by the complainant who asked him why he was cutting down the trees. She allegedly told him that he would not live on the property and she went away. Later on the complainant's mother met the appellant and asked him why he had chased and abused the complainant. He denied having done so.

On 2nd December, 2005, the complainant's mother visited the appellant's wife and said that she wanted to discuss and sort out a certain issue. The appellant said that he did not know what the complainant's mother was talking about. He further testified that on the following day the complainant's mother told her that he had sexually assaulted the complainant and she demanded Kshs.1,000/- on account of medical expenses that she had incurred. The appellant agreed to pay that money so that he could secure the treatment notes and use the same as evidence in a defamation case that he wanted to file against PW2, the complainant's mother. He then decided to go to Semata Police Post and make a report. As soon as he arrived there he was arrested and charged with the said offence.

From my analysis of the above evidence, it is not in dispute that the appellant and the complainant met on the material day. However, the appellant denied having assaulted the complainant and gave his own explanation as to what transpired. The complainant reported to her mother, PW2, that she had been sexually assaulted by the appellant. The complainant knew the appellant and was therefore able to recognize him without any difficulties. PW2 went to see the appellant immediately thereafter. She even made effort to see the appellant's wife so that they could discuss the issue. When PW2 reported the matter to the police, the police commenced their investigations and went to the scene of the crime and found that the grass thereon had been disturbed. There could not have been any other explanation as to why that was so except that the appellant had forcefully assaulted the complainant on that particular spot. There was also medical evidence that the complainant had been sexually assaulted. The fact that the appellant agreed to refund the complainant's mother a sum of Kshs.1,000/- which she had spent on the complainant's treatment was clear prove that the appellant had a guilty mind. I do not agree that all he wanted was to secure evidence upon which he was to institute a civil suit against the complainant's mother. The appellant was not convicted on uncorroborated evidence of a minor as he alleged. There was sufficient corroboration from the evidence that was tendered by the police as well as the Clinical Officer, PW3. In any event under **Section 124** of the **Evidence Act**, if an accused person is charged with a sexual offence and the only evidence available is that of a child of tender years who is the alleged victim of the offence, the trial court can convict the accused person on uncorroborated evidence of the child if the court is satisfied that the child is telling the truth.

I am of the view that the appellant was properly convicted by the trial court. The sentence that was meted out cannot be said to be harsh since the maximum sentence is life imprisonment with hard labour. For these reasons, I dismiss the appeal and confirm the conviction and sentence that was passed by the trial court.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of the appellant and N/A for the state.

D. MUSINGA

JUDGE